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Supreme Court, U.S.
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No. 96-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DR. MARK F. ALEXANDER,

Petitioner,

v.

RUSH NORTH SHORE MEDICAL CENTER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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14 pp

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following are all of the parties to this case in the United States Court of Appeals for the Seventh Circuit: Dr. Mark F. Alexander, as plaintiff-appellant, and Rush North Shore Medical Center, as defendant-appellee.

RULE 29.6 LISTING

Rush North Shore Medical Center is a community hospital that is an Illinois not-for-profit corporation qualified as a charitable organization under Section 501(c)(3) of the Internal Revenue Code. The owner and sole corporate member of Rush North Shore Medical Center is Rush North Shore Health Services, which is itself an Illinois not-for-profit corporation. No publicly held company owns 10 percent or more of Rush North Shore Medical Center, and it has no subsidiaries.

TABLE OF CONTENTS

	PAGE
LIST OF PARTIES	i
RULE 29.6 LISTING	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	2
REASONS WHY THE PETITION SHOULD BE DENIED	6
I.	
THERE IS NO CONFLICT BETWEEN THE CIRCUITS.	6
II.	
THE UNDISPUTED RECORD AMPLY SUPPORTED THE SEVENTH CIRCUIT'S RULING.	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

	Page(s)
Alexander v. Rush North Shore Medical Center, 101 F.3d 487 (7th Cir. 1996)	passim
Alexander v. Rush North Shore Medical Center, 851 F. Supp. 330 (N.S. Ill. 1994)	passim
Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983)	7
Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)	7
Doe v. St. Joseph's Hosp. of Fort Wayne, 788 F.2d 411 (7th Cir. 1986)	3, 4, 5
Eyerman v. Mary Kay Cosmetics, Inc., 967 F.2d 213 (6th Cir. 1992)	7
McIntire v. Bowen-Leavitt Insurance Agency, Inc., 1996 LEXIS 31331 (10th Cir. December 5, 1996)	8
Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992)	5, 6
NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944)	6
Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996)	7
United States v. Silk, 331 U.S. 704 (1947)	6, 7

Statutes

Page(s)

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq* . . . . . passim

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Rush North Shore Medical Center, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's opinion in this case. That opinion, as amended by the Order of February 7, 1997 denying rehearing and the suggestion for rehearing *en banc*, is reported at 101 F.3d 487 (7th Cir. 1996). The decision of the district court granting partial summary judgment is published at 851 F. Supp. 330. The decision of the district court after trial is found at Pet. App. 14.

STATEMENT OF THE CASE

Petitioner, Dr. Mark Alexander asserted claims based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*, purportedly arising out of the revocation of his staff privileges at Rush North Shore Medical Center in 1988. Dr. Alexander was granted staff privileges as an anesthesiologist at Rush North Shore Medical Center (then Skokie Valley Hospital) in 1974, when he went by the name of Mohammed Faoud Abd-Allah. *Alexander v. Rush North Shore Medical Center*, 101 F.3d at 488. The Board's decision to revoke Dr. Alexander's privileges was based on events that took place in the emergency room on the night of February 20, 1988 and was made only after two hospital committees and the Board itself had reviewed the charges against Dr. Alexander that were initiated by Dr. Patricia Bitter, who was on duty in the emergency room that night. *Id.* at 489.

On February 21, 1988, Dr. Bitter submitted a complaint to the hospital's Chief of Staff, reporting that she had asked Dr. Alexander to come to assist her with an emergency room patient and he had refused to come to the hospital. *Id.* Dr. Bitter reported that in the early evening of February 20, she was treating a patient who had suffered a head injury and was comatose. *Id.* She and a respiratory therapist were unsuccessful in their attempts to secure the patient's airway by endotracheal intubation to prevent an obstruction to breathing. Dr. Bitter paged a surgeon and while awaiting his response, telephoned Dr. Alexander and asked him to come to the emergency room to assist her with the patient. Dr. Alexander refused. *Id.* Dr. Alexander never disputed that he was on call and obligated to come to the hospital when asked by the emergency room physician. Dr. Alexander conceded that at the time of this phone call and the subsequent complaint, Dr. Bitter had no knowledge of his religion, national origin or color.

Dr. Bitter's complaint was corroborated by contemporaneous hand-written emergency room notes, by the respiratory therapist, and by the records prepared by the chief nurse on duty that night. In addition, the general surgeon who responded to Dr. Bitter that night confirmed that she had told him that Dr. Alexander had refused to come to the hospital. Dr. Bitter's complaint was reviewed by the hospital's Medical Executive Committee (17 doctors), the Board of Trustees (5 medical doctors, 13 independent lay members, and the hospital President), the Medical Appeals Committee (5 individuals), and again by the Medical Executive Committee. *Alexander v. North Shore Medical Center*, 851 F. Supp. at 331-32. These reviews were followed by a final decision to revoke privileges by the Board of Trustees. Dr. Alexander's color, religion, or national origin were never discussed and Dr. Alexander conceded that 13 members of the Board of Trustees (the substantial majority of those who voted), as well as the hospital's President had no knowledge of Dr. Alexander's color, religion, or national origin. Through all stages of the proceedings Dr. Alexander remained unrepentant and refused to give assurances with regard to his future conduct. *Id.* at 334.

After discovery, the hospital moved for summary judgment on two grounds. First, the hospital asserted that Dr. Alexander's status as an independent contractor precluded relief under Title VII. 101 F.3d at 490. The hospital relied on the undisputed facts relating to Dr. Alexander's total control over the care of his patients, his own statements regarding his independent contractor status made in tax reports, and in his insurance, social security, and related business record keeping. *Id.* at 493. The district court denied summary judgment, 851 F. Supp. at 332, holding that Dr. Alexander might be able to establish that the hospital controlled his employment opportunities, placing him within the scope of the Seventh Circuit's decision in *Doe v. St. Joseph's Hospital of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986).

Second, the hospital asserted that the undisputed facts established that the revocation of Dr. Alexander's privileges was not based on discrimination, but on the hospital's honest belief that Dr. Alexander had engaged in serious misconduct. 101 F.3d at 490. Finding that Rush North Shore had offered undisputed facts showing a legitimate, nondiscriminatory reason for terminating Dr. Alexander's staff privileges, the district court granted summary judgment in part. 851 F. Supp. at 333. The court ruled that Dr. Alexander would not be permitted to attempt to prove at trial that the incident did not occur. *Id.* The district court also granted judgment for the hospital on Dr. Alexander's claim that two other Rush doctors had been involved in "comparable" situations, but were treated differently. The district court viewed these two doctors as incomparable, in part, because they -- in contrast to Dr. Alexander -- had acknowledged their errors and assured the hospital that the conduct would not be repeated. 851 F. Supp. at 334. The only remaining issue for trial was Dr. Alexander's contention that the stated reason for terminating his privileges was pretextual and that his color, religion, or national origin were the true basis for the hospital's action. *Id.* at 336.

After a trial on these remaining issues, the district court rejected Dr. Alexander's assertions that any of the doctors specified by him were guilty of similar transgressions but were treated more favorably than Dr. Alexander. (Pet. App. 26, 31.) Nor did Dr. Alexander succeed in persuading the court of any improper animus on the part of the hospital. (*Id.* at 29.) Despite the district court's use of a legal standard that permitted Dr. Alexander to pursue his claim, he lost, utterly failing to persuade the district court that any violation of Title VII had occurred. (*Id.* at 30-31.)

The Seventh Circuit Court of Appeals affirmed the result but reached its judgment in a different way. It overruled *Doe v. St. Joseph's Hospital of Fort Wayne*, the decision relied upon by the district court to deny the summary judgment motion relating to Dr.

Alexander's independent contractor status. It held that the status of physicians, like the status of all other workers, had to be determined under the uniform rule of *Nationwide Mut. Ins. Co. v. Darden*. It further held that applying *Darden*, Dr. Alexander was an independent contractor and had no standing to sue under Title VII. 101 F.3d at 490-92. Dr. Alexander moved for rehearing and suggested rehearing *en banc*, asking the Seventh Circuit to reconsider its position on *Doe* and asserting that he had been blindsided by the independent contractor issue (despite the fact that it was briefed on summary judgment and on appeal) and had been denied an adequate opportunity to present facts on that issue. *Id.* at 494. The Seventh Circuit rejected his contention and amended its opinion:

> We are aware that at trial, the district court -- relying on *Doe* -- permitted neither Dr. Alexander nor Rush North Shore to introduce evidence of Dr. Alexander's "employment status." This fact, however, does not require us to remand this case to the district court for a determination of whether Dr. Alexander was an employee of the hospital or an independent contractor. At the summary judgment stage, both parties had the opportunity to fully address this issue. Thus, we can appropriately rely upon the record, as well as the uncontested facts in the Pretrial Order, [footnote omitted] to conclusively determine that Dr. Alexander was an independent contractor.

101 F.3d at 494. The Seventh Circuit noted that it had examined the contested facts from the Pretrial Order in the light most favorable to Dr. Alexander, and found that he was an independent contractor without recourse under Title VII. *Id.* at n.3.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

In the first three questions presented for review in the petition, Dr. Alexander challenges the Seventh Circuit's use of the common law agency test to evaluate whether a Title VII plaintiff is an employee or an independent contractor. Dr. Alexander contends that a special rule should apply for physicians with staff privileges because of so-called "economic realities," which he asserts the Seventh Circuit ignored. Moreover, Dr. Alexander argues that there is a conflict in the Circuit Courts of Appeals between use of the common law agency test and the "economic realities" test. (Pet. 7.) Dr. Alexander is simply wrong. First, this Court's decision in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), established that the common law agency test employed by the Seventh Circuit is controlling under Title VII and whenever the statutory definition of "employee" fails to give specific guidance on that term's meaning.

Indeed, in *Darden*, this Court rejected the argument and the same authority cited in the Petition for the proposition that a broader test should apply to social welfare legislation. (Pet. 9.) In *Darden*, this Court repudiated the Fourth Circuit's citation to *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), and *United States v. Silk*, 331 U.S. 704 (1947), relied on by petitioner here (Pet. 9), for the proposition that the term "employee" must be construed more liberally when social welfare legislation is at issue:

> But *Hearst* and *Silk*, which interpreted "employee" for purposes of the National Labor Relations Act and Social Security Act, respectively, are feeble precedents for unmooring

> the term from the common law. In each case, the Court read "employee," which neither statute helpfully defined, to imply something broader than the common-law definition; after each opinion, Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning.
>
> * * *
>
> *Reid*'s [*Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)] presumption that Congress means an agency law definition for "employee" unless it clearly indicates otherwise signaled our abandonment of *Silk*'s emphasis on construing that term "'in the light of the mischief to be corrected and the end to be attained.'"

Darden, 503 U.S. at 324-25 [footnotes and citations omitted]. Thus, *Darden* established the presumptive rule, which varies only when Congress specifies otherwise. Congress has not specified otherwise in Title VII.

Second, there is no conflict in the Circuits. All courts must follow *Darden*, and they have done so. The cases petitioner cites for other approaches all predate *Darden*. (Pet. 9-10.)

Moreover, the dichotomy that petitioner relies upon between the "economic realities" test and the *Darden* test does not exist and does not deserve the attention of this Court. Citing its own decision in *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983), relied upon by the petitioner (Pet. 9), the Sixth Circuit recently concluded that there is no substantive conflict between the "economic realities" test and *Darden*'s mandate. *Simpson v. Ernst & Young*, 100 F.3d 436, 441-42 (6th Cir. 1996) (explaining the ruling in *Eyerman v. Mary*

Kay Cosmetics, Inc., 967 F.2d 213 (6th Cir. 1992)). The "hybrid test" which applies both the common-law agency test and the "economic realities" test also is substantially the same as the test articulated in *Darden*. *McIntire v. Bowen-Leavitt Insurance Agency, Inc.*, 1996 LEXIS 31331 *7 n.6 (10th Cir. December 5, 1996) ("[w]e have recently explained, however, that the common-law test described by *Darden* is in practice largely indistinguishable from the hybrid approach historically applied by the Tenth Circuit in Title VII cases.").

There is no reason to grant certiorari to address an issue which the Circuit Courts view as resolved.

II.

THE UNDISPUTED RECORD AMPLY SUPPORTED THE SEVENTH CIRCUIT'S RULING.

Petitioner's final issue asserted to justify review is the contention that he was denied a full opportunity to present evidence on the independent contractor/employee issue. However, petitioner fails to note that this was a key issue at summary judgment and was fully briefed. Petitioner also fails to alert the Court that the Pretrial Order (submitted prior to the summary judgment ruling) contained both undisputed and disputed facts on this issue. Finally, petitioner fails to report that on denying rehearing, the Seventh Circuit rejected the specific contention that a further trial on this issue was required. The Seventh Circuit specifically stated that it was relying on the uncontested facts in the Pretrial Order and a view of the contested facts most favorable to Dr. Alexander to determine that he was an independent contractor. 101 F.3d at 494 and n.3.

Petitioner has had his day in court. Even when the district court erroneously permitted his claim to proceed to trial, petitioner was unable to persuade the court that discriminatory animus rather

than his own conduct was the cause of the revocation of his privileges. There is no basis for review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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